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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 RICHARD A. RIVERS, SR.,)
7 Plaintiff,) No. CV-11-4-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 **BEFORE THE COURT** are cross-motions for summary judgment noted
14 for hearing without oral argument on May 25, 2012, ECF No. 13, 19.
15 Attorney Maureen J. Rosette represents Plaintiff; Special
16 Assistant United States Attorney Stephanie Lynn F. Kiley
17 represents the Commissioner of Social Security (Defendant). The
18 parties have consented to proceed before a magistrate judge, ECF
19 No. 7. On December 29, 2011, Plaintiff filed a reply, ECF No. 14.
20 After reviewing the administrative record and the briefs filed by
21 the parties, the court **GRANTS** Defendant's motion for summary
22 judgment, **ECF No. 19.**

23 **JURISDICTION**

24 Plaintiff applied for supplemental security income (SSI)
25 benefits on April 25, 2007. He alleged disability as of February
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1 1, 2007¹ (Tr. 78-84). The application was denied initially and on
2 reconsideration (Tr. 47-50, 57-58).

3 At a hearing before Administrative Law Judge (ALJ) Robert S.
4 Chester on February 18, 2009, Plaintiff, represented by counsel,
5 and a vocational expert testified (Tr. 24-44). On March 11, 2009,
6 the ALJ issued an unfavorable decision (Tr. 14-20). The Appeals
7 Council denied review on December 8, 2010 (Tr. 1-6), making the
8 ALJ's decision the final decision of the Commissioner. Plaintiff
9 filed this action for judicial review pursuant to 42 U.S.C.
10 § 405(g) on January 4, 2011 (ECF No. 1,4).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, and the briefs of the parties.
14 They are briefly summarized here.

15 Plaintiff was 44 years old at the hearing. He earned a GED
16 and has worked as a casino slot attendant, cashier, housekeeper,
17 and umpire (Tr. 27-29). He last worked in October 2006 but stopped
18 due to coughing spells. Plaintiff testified he blacks out at least
19 once a day due to severe coughing spells. He can walk 2 blocks and
20 lift 5 to 10 pounds. He has asthma and respiratory papillomatosis.
21 He testified the latter had spread from the trachea to the lungs.
22 He smokes five cigarettes a day and his doctor has "been on [him]
23 about quitting" (Tr. 29-38, 95). Coughing causes sleep problems.
24 Medication sometimes makes him drowsy. He uses a nebulizer three
25 times a day (Tr. 30, 32-33, 35).

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28 ¹Interestingly, in 2006 Plaintiff told ER personnel he has
had a very chronic dry cough since high school (Tr. 174).

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a Plaintiff is not only unable to do previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not, the decision maker proceeds to step two, which determines whether Plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If Plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares Plaintiff's impairment with a number of listed

1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
4 App. 1. If the impairment meets or equals one of the listed
5 impairments, Plaintiff is conclusively presumed to be disabled.
6 If the impairment is not one conclusively presumed to be
7 disabling, the evaluation proceeds to the fourth step, which
8 determines whether the impairment prevents Plaintiff from
9 performing work which was performed in the past. If a Plaintiff is
10 able to perform previous work, that Plaintiff is deemed not
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
12 this step, Plaintiff's residual functional capacity (RFC)
13 assessment is considered. If Plaintiff cannot perform this work,
14 the fifth and final step in the process determines whether
15 Plaintiff is able to perform other work in the national economy in
16 view of Plaintiff's residual functional capacity, age, education
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon Plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
23 met once Plaintiff establishes that a physical or mental
24 impairment prevents the performance of previous work. *Hoffman v.*
25 *Heckler*, 785 F.3d 1423, 1425 (9th Cir.1986). The burden then
26 shifts, at step five, to the Commissioner to show that (1)
27 Plaintiff can perform other substantial gainful activity and (2) a
28 "significant number of jobs exist in the national economy" which

1 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 2 Cir.1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.1999).

3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a
 5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 6 the Commissioner's decision, made through an ALJ, when the
 7 determination is not based on legal error and is supported by
 8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
 9 Cir.1985); *Tackett*, 180 F.3d at 1097 (9th Cir.1999). "The
 10 [Commissioner's] determination that a plaintiff is not disabled
 11 will be upheld if the findings of fact are supported by
 12 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
 13 Cir.1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more
 14 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 15 n. 10 (9th Cir.1975), but less than a preponderance. *McAllister v.*
 16 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*
 17 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
 18 Cir.1988). Substantial evidence "means such evidence as a
 19 reasonable mind might accept as adequate to support a conclusion."
 20 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations
 21 omitted). "[S]uch inferences and conclusions as the [Commissioner]
 22 may reasonably draw from the evidence" will also be upheld. *Mark*
 23 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
 24 Court considers the record as a whole, not just the evidence
 25 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
 26 877 F.2d 20, 22 (9th Cir.1989)(quoting *Kornock v. Harris*, 648 F.2d
 27 525, 526 (9th Cir.1980)).

28 It is the role of the trier of fact, not this Court, to

1 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
2 evidence supports more than one rational interpretation, the Court
3 may not substitute its judgment for that of the Commissioner.
4 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
5 (9th Cir.1984). Nevertheless, a decision supported by substantial
6 evidence will still be set aside if the proper legal standards
7 were not applied in weighing the evidence and making the decision.
8 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
9 433 (9th Cir.1987). Thus, if there is substantial evidence to
10 support the administrative findings, or if there is conflicting
11 evidence that will support a finding of either disability or
12 nondisability, the finding of the Commissioner is conclusive.
13 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

14 **ALJ'S FINDINGS**

15 At step one the ALJ found Plaintiff did not engage in
16 substantial gainful activity after onset (Tr. 16). At step two he
17 found Plaintiff suffers from respiratory papillomatosis, a severe
18 impairment (Id.). At step three the ALJ found the impairment did
19 not meet or equal a Listed impairment (Tr. 17). The ALJ found
20 Plaintiff less than fully credible (Tr. 18). At step four, he
21 relied on a vocational expert and found Plaintiff is able to
22 perform past relevant work, meaning Plaintiff was not disabled as
23 defined by the Social Security Act during the relevant period (Tr.
24 19-20, 42).

25 **ISSUES**

26 Plaintiff alleges the ALJ erred when he failed to credit the
27 opinion of treating doctor Gregory Loewen, D.O., found Plaintiff
28 is able to perform light work, and found he is less than fully

1 credible (ECF No. 14 at 7-13).

2 The Commissioner asserts the ALJ's decision is supported by
3 substantial evidence and free of legal error. He asks the Court to
4 affirm (ECF No. 20 at 2).

5 DISCUSSION

6 A. Weighing medical evidence

7 In social security proceedings, the claimant must prove the
8 existence of a physical or mental impairment by providing medical
9 evidence consisting of signs, symptoms, and laboratory findings;
10 the claimant's own statement of symptoms alone will not suffice.
11 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
12 on the basis of a medically determinable impairment which can be
13 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
14 medical evidence of an underlying impairment has been shown,
15 medical findings are not required to support the alleged severity
16 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
17 1991).

18 A treating physician's opinion is given special weight
19 because of familiarity with the claimant and the claimant's
20 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
21 1989). However, the treating physician's opinion is not
22 "necessarily conclusive as to either a physical condition or the
23 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
24 751 (9th Cir.1989)(citations omitted). More weight is given to a
25 treating physician than an examining physician. *Lester v. Cater*,
26 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more weight is
27 given to the opinions of treating and examining physicians than to
28 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592

1 (9th Cir.2004). If the treating or examining physician's opinions
2 are not contradicted, they can be rejected only with clear and
3 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
4 ALJ may reject an opinion if he states specific, legitimate
5 reasons that are supported by substantial evidence. See *Flaten v.*
6 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
7 1995).

8 In addition to the testimony of a nonexamining medical
9 advisor, the ALJ must have other evidence to support a decision to
10 reject the opinion of a treating physician, such as laboratory
11 test results, contrary reports from examining physicians, and
12 testimony from the claimant that was inconsistent with the
13 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
14 751-52 (9th Cir.1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
15 Cir.1995).

16 Plaintiff alleges the ALJ should have credited two of Dr.
17 Loewen's opinions. He began treating Plaintiff in April 2007. The
18 Commissioner answers the ALJ properly rejected both Dr. Loewen's
19 May 2007 and March 2008 opinions.

20 The Commissioner points out the 2007 opinion is on a DSHS
21 check-box form, and DSHS's definitions differ from the SSA's (ECF
22 No. 20 at 10, referring to Tr. 204-207). Dr. Loewen opined
23 Plaintiff's ability to work is severely limited, meaning as
24 defined he is unable to lift at least 2 pounds or unable to stand
25 and/or walk (Tr. 206). The bases for this conclusion is not given.
26 The ALJ correctly notes when such forms do not provide significant
27 explanation of the basis for the conclusions, they may
28 appropriately be accorded little or no weight (Tr. 19). See *Crane*

1 v. *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)(ALJ's rejection of a
2 check-off report that did not contain an explanation of the bases
3 for the conclusions was permissible).

4 Dr. Loewen rendered this opinion on the basis of a single
5 examination a month earlier, as the Commissioner accurately
6 observes, ECF No. 20 at 12. Perhaps most significant, the April
7 2007 opinion is inconsistent with Dr. Loewen's treatment notes and
8 with Plaintiff's testimony (ECF No. 20 at 12-14).

9 Dr. Loewen's treatment notes in October 2007 indicate
10 Plaintiff's spirometry results have been stable, as was asthma on
11 the current medication regimen (Tr. 243).

12 The form Dr. Loewen completed indicates Plaintiff is unable
13 to sit, stand, walk, lift, handle, or carry (Tr. 206), yet
14 Plaintiff testified he is able to walk two blocks, slowly climb
15 stairs, do laundry, cook, and shop (Tr. 31-32, 34, 36). Six months
16 after Dr. Loewen's dire assessment, treating primary care
17 physician Ethan Angell, M.D., notes Plaintiff hurt his shoulder
18 throwing a football with his son (Tr. 333).

19 The ALJ observes the opinion is unsupported by clinical
20 evidence. Dr. Loewen's own reports fail to reveal the type of
21 significant clinical and laboratory abnormalities one would expect
22 if Plaintiff was as limited as Dr. Loewen opined (Tr. 18). Each is
23 a specific, legitimate reason supported by the evidence for
24 discounting the contradicted opinion. See e.g., *Bayliss v.*
25 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005)(ALJ may reject any
26 medical opinion that is brief, conclusory, and inadequately
27 supported by clinical findings).

28 In a letter date March 17, 2008, Dr. Loewen opined Plaintiff

1 is completely disabled. His cough is so severe that "he is not
2 even able to perform pulmonary function testing" (Tr. 203).

3 To further aid in weighing the conflicting medical evidence,
4 the ALJ evaluated plaintiff's credibility and found him less than
5 fully credible (Tr. 18). Credibility determinations bear on
6 evaluations of medical evidence when an ALJ is presented with
7 conflicting medical opinions or inconsistency between a claimant's
8 subjective complaints and diagnosed condition. See *Webb v.*
9 *Barnhart*, 433 F.3d 683, 688 (9th Cir.2005).

10 It is the province of the ALJ to make credibility
11 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
12 1995). However, the ALJ's findings must be supported by specific
13 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
14 1990). Once the claimant produces medical evidence of an
15 underlying medical impairment, the ALJ may not discredit testimony
16 as to the severity of an impairment because it is unsupported by
17 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
18 1998). Absent affirmative evidence of malingering, the ALJ's
19 reasons for rejecting the claimant's testimony must be "clear and
20 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995).
21 "General findings are insufficient: rather the ALJ must identify
22 what testimony not credible and what evidence undermines the
23 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
24 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993).

25 The ALJ gave several clear and convincing reasons for his
26 credibility assessment. Plaintiff's testimony is contradicted by
27 the objective evidence. He testified he often blacks out, at least
28 once a day, from coughing spells. The ALJ notes Dr. Loewen's

1 treatment records show Plaintiff complained of this twice in 2006
2 (Tr. 18, referring to Tr. 208). Plaintiff testified respiratory
3 papillomatosis spread from the trachea to the lungs, but Dr.
4 Loewen opined in July 2008 recent bronchoscopy showed the disease
5 had not progressed and Plaintiff was stable on his medications
6 (Tr. 18, 36-37, 266).

7 Plaintiff's statements have been inconsistent. The ALJ
8 observes Mr. Rivers told several health care providers he had quit
9 smoking, but he had not (Tr. 18); *cf.* Tr. 324 (in March 2007
10 Plaintiff told Dr. Angell he smokes) *with* Tr. 208 (in May 2007 he
11 told Dr. Loewen he quit smoking in 2005).

12 Finally, the ALJ points out Plaintiff has not stopped
13 smoking, suggesting his impairment is not as disabling as alleged
14 (Tr. 18).

15 The ALJ's reasons for finding plaintiff less than fully
16 credible are clear, convincing, and fully supported by the record.
17 *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.2002)
18 (proper factors include inconsistencies in plaintiff's statements,
19 inconsistencies between statements and conduct, and extent of
20 daily activities). Noncompliance with medical care or unexplained
21 or inadequately explained reasons for failing to seek medical
22 treatment also cast doubt on a claimant's subjective complaints.
23 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603
24 (9th Cir.1989).

25 The ALJ's credibility assessment is free of error.

26 The ALJ rejected Dr. Loewen's March 2008 opinion for some of
27 the same reasons he rejected the first, namely, it lacks
28 supporting objective evidence in Dr. Loewen's own reports, and it

1 is without support elsewhere in the record (Tr. 18). Both are
2 specific, legitimate, and supported by substantial evidence.

3 **B. RFC**

4 Plaintiff asserts the ALJ erred when he assessed an RFC for
5 light work (ECF No. 14 at 9).

6 When he determined plaintiff's RFC, the ALJ weighed the
7 evidence as outlined above. Plaintiff's argument simply restates
8 the issues already addressed by the Court.

9 The ALJ is responsible for reviewing the evidence and
10 resolving conflicts or ambiguities in testimony. *Magallanes v.*
11 *Bowen*, 881 F.2d 747, 751 (9th Cir.1989). It is the role of the
12 trier of fact, not this court, to resolve conflicts in evidence.
13 *Richardson*, 402 U.S. at 400. The court has a limited role in
14 determining whether the ALJ's decision is supported by substantial
15 evidence and may not substitute its own judgment for that of the
16 ALJ, even if it might justifiably have reached a different result
17 upon de novo review. 42 U.S.C. § 405 (g).

18 The ALJ's RFC is fully supported by the record and free of
19 legal error.

20 **CONCLUSION**

21 Having reviewed the record and the ALJ's conclusions, this
22 court finds that the ALJ's decision is free of legal error and
23 supported by substantial evidence..

24 **IT IS ORDERED:**

25 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
26 **GRANTED.**

27 2. The District Court Executive is directed to file this
28 Order, provide copies to counsel, enter judgment in favor of

1 defendant, and **CLOSE** this file.

2 DATED this 19th day of June, 2012.

3
4 s/ James P. Hutton
JAMES P. HUTTON
5 UNITED STATES MAGISTRATE JUDGE
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